UNITED STATES
v.
ANDREW L. FREESE II

IBLA 78-346 Decided September 6, 1978

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer declaring 5 millsite and 17 lode mining claims null and void. I 9758.

Affirmed.

1. Administrative Authority: Generally--Mining Claims: Contests--Mining Claims: Determination of Validity--Secretary of the Interior

   The Secretary of the Interior has the authority to determine the validity of mining claims on any public lands of the United States v.after adequate notice and opportunity for a hearing. A mining claim contest may be initiated under the authority of the Secretary of the Interior by the Bureau of Land Management at the behest of the Forest Service and prosecuted by counsel employed by the Department of Agriculture, with Forest Service employees as witnesses, where such action is in accordance with a Memorandum of Understanding between the agencies.

2. Mining Claims: Hearings--Rules of Practice: Hearings

   A second hearing will not be afforded generally where a claimant was given notice and an opportunity to appear at a hearing, where he did appear and was represented at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result.

3. Administrative Procedure: Burden of Proof--Mining Claims: Contests--Mining Claims: Discovery: Generally

When the Government contests a mining claim on a charge of no discovery, it has by practice assumed the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made and still exists within the limits of the claim.

APPEARANCES: Robert S. Moore, Esq., Boise, Idaho, for appellant; Erol R. Benson, Esq., Office of the General Counsel, U.S. Department of Agriculture, Ogden, Utah, for appellee.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

This is an appeal from a decision dated March 6, 1978, which denied appellant's motions to dismiss and vacate, and declared millsites and lode mining claims null and void for failure to use the millsites for mining or milling purposes and lack of discovery on any of the mining claims. 1/

The mining and millsite claims involved were located by appellant on various dates between October 1964 and July 1972. They are all included within the Sawtooth National Recreation Area in the State of Idaho as established by the Act of August 22, 1972, 86 Stat. 612. Section 10 of that Act, 86 Stat. 614, withdrew the lands from all forms of location, entry, and patent under the mining laws of the United States, subject to valid existing rights.

On December 30, 1975, at the behest of the Forest Service, U.S. Department of Agriculture, the BLM initiated this mining claim contest by serving a complaint on appellant. In his answer, appellant asked for dismissal on the ground that the procedure used to initiate

---

1/ These claims are: URA and WO3 millsite claims situated in secs. 27 and 28, T. 7 N., R. 14 E., Boise meridian, Blaine County, Idaho; the Pole "A," Pole "B" and Pole "C" millsite claims situated in protracted secs. 15 and 16, T. 7 N., R. 15 E., Boise meridian, Idaho (unsurveyed); the Pole #3, Pole #4, Pole #5, Pole #6, Pole #7, Pole #8, Pole #9, Pole #10, Pole #11, Pole #12, Pole #13, Pole #14, Pole #15, Pole #16, Pole #18, Pole #21, and Pole #31 lode mining claims situated in protracted secs. 10, 11, 14 and 15, T. 7 N., R. 15 E., Boise meridian (within the Sawtooth National Forest), Custer County, Idaho (unsurveyed).

the contest was invalid in that the Department of the Interior, not the Forest Service, has authority to examine and evaluate mining claims. On July 29, 1976, the motion to dismiss was denied by Administrative Law Judge Sweitzer and the hearing was scheduled for March 17, 1977. On September 10, 1976, this Board dismissed an appeal from the ruling of July 29, 1976.

On March 3, 1977, appellant filed a motion with Judge Sweitzer to postpone the March 17, 1977, hearing. This motion was denied March 7, 1977. 2/ About the same time, March 7, 1977, this Board denied appellant's petition for reconsideration of his appeal from the denial of his motion to dismiss. At that time the Board ruled that: "[T]he procedures being followed in this contest are wholly consonant with Departmental practice, and the strictures of the Administrative Procedure Act." The hearing was held March 18, 1977. Thereafter, Judge Sweitzer's decision, dated March 6, 1978, reaffirmed denial of appellant's motions to dismiss based on appellant's assertion that the Forest Service lacks jurisdiction to determine the validity of mining claims and to vacate the hearing to allow him an opportunity for physical examination of his mining claims. The claims were declared null and void.

The Federal mining laws allow citizen exploration for and extraction of valuable minerals from the public domain, and provide for securing fee title to such lands. Act of May 10, 1872, as amended, 30 U.S.C. § 22 et seq. (1970). Rights against the exist under mining claims only if, inter alia, a valuable mineral deposit has been discovered within the limits of each claim, as determined by the "prudent man test," augmented by the marketability test. United States v. Coleman, 390 U.S. 599 (1968); Cole v. Ralph, 252 U.S. 286 (1920); Chrisman v. Miller, 197 U.S. 313 (1905). When land is withdrawn from the mining laws, the right to enter for mineral exploration terminates. United States v. Snyder, 72 I.D. 223 (1965), aff'd, 405 F.2d 1179 (10th Cir. 1968).

Appellant makes two basic arguments in his statement of reasons: (1) that the Administrative Law Judge erred in denying the motion to dismiss because the procedures followed are contrary to law, and (2) that the Administrative Law Judge erred in denying the motion to vacate the hearing to allow appellant an opportunity for examination of his claim. He requests the contest be dismissed, or in the alternative, that the case be reopened to allow appellant an opportunity to have his claims examined and to have the examiner testify for the record.

2/ A 1-day postponement was later granted due to a previous commitment of appellant's attorney for March 17.

[1] When the land in question was withdrawn for inclusion in the Sawtooth National Recreation Area, the Forest Service, as the agency responsible for administering the area, had an interest in having the validity of any mining claims determined. See 43 CFR 1862.4, pointing out that a claim in an area administered by the Forest Service may be contested by the Forest Service at any time prior to issuance of patent. This right has been implicitly recognized under section 5 of the Surface Resources Act, 30 U.S.C. § 613 (1970); in Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); and in a suit for ejectment, United States v. Nogueira, 403 F.2d 816 (9th Cir. 1968). Numerous cases, both before the Board and in the Federal courts, have accepted the procedures complained of here without comment. E.g., Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1970); Duval v. Morton, 347 F. Supp. 501 (D. Ore. 1972); Stevens v. Hickel, Civ. No. 1-70-94 (D. Idaho 1971); United States v. Frisco, 32 IBLA 248 (1977). Others have specifically found a contest initiated by BLM at the request of another agency, to be proper. United States v. Diven, 32 IBLA 361 (1977); State of California, et al. v. Doria Mining and Engineering Corp., et al., 17 IBLA 380 (1974), aff'd sub nom. Doria Mining and Engineering Corp. v. Morton, 420 F. Supp. 827 (1976), appeal pending; United States v. Ramsher Mining and Engineering Co., 14 IBLA 32 (1973).

In Diven, supra at 32 IBLA 365, 366, the Board disposed of arguments similar to this appellant's contentions concerning the authority of the Forest Service to initiate contests, to use Forest Service mineral examiners as witnesses, and Department of Agriculture attorneys in the prosecution of the case. The Board stated:

> Although BLM will initiate a contest against a mining claim by issuing a complaint, the request for such may come from any Federal Agency which has Federal public lands under its jurisdiction encumbered by unpatented mining claims. * * *
>
> * * * It is proper for the Government to be represented by counsel employed by the Department of Agriculture acting on behalf of the Forest Service. * * * However, the final determination of the validity of such unpatented mining claims will be made by the Department of the Interior, after notice and opportunity for a hearing. Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); U.S. v. Dummar, 9 IBLA 308 (1973).

The Ramsher case, supra, specifically holds it proper and in accordance with the Memorandum of Understanding between the agencies, VI BLM Manual 3.1, that the contest be prosecuted by the Office of General Counsel, Department of Agriculture, in behalf of the Forest Service. Also, see United States v. Dummar, supra; United States v. Bars, 6 IBLA 113 (1972).

The procedures followed in this case have been no different from those approved in other cases and are in accord with the Administrative Procedure Act, 5 U.S.C. § 500 et seq. (1970). The quasi-judicial determination of invalidity of the mining and millsite claims is made by the Department of the Interior. See 43 U.S.C. §§ 2 and 1457 (1970). The motion to dismiss was properly denied.

[2] Appellant's motion to vacate the hearing and reopen the record must be denied. The regulations allow postponement of hearing only upon a showing of good cause and proper diligence. 43 CFR 4.452-3. Appellant has shown neither. The hearing date was set July 29, 1976, for the following March, allowing appellant ample time to have his claims examined by his own potential witnesses. He is not excused from having his own expert witnesses merely because he was challenging the right of the Forest Service to request initiation of the contest and participate in its prosecution. Appellant has offered no evidence to show that the Forest Service witnesses were not qualified, or that their testimony failed to have credibility and probative effect. Also, we cannot accept appellant's suggestions that a BLM examiner may have made a recommendation different from that made by the Forest Service's examiners.

Appellant was requested by the Forest Service mineral examiner to point out his discoveries so that tests could be made. Appellant refused to cooperate and cannot now claim he had no opportunity for an examination. "The Government examiner has no duty to undertake discovery work or explore beyond the current workings of the claim and the claimant must keep discovery points available for Government inspection." United States v. Johnson, 33 IBLA 121 (1977). See also United States v. Becker, 33 IBLA 301 (1978); United States v. Frisco, supra. In Johnson the Board held claimant was not entitled to a second hearing where she had notice of, and appeared at, the first hearing, and no evidence was submitted suggesting another hearing would produce a different result. New hearings are generally granted only when there is some indication that a different finding might result. United States v. Weigel, 26 IBLA 183 (1976); United States v. Edeline, 24 IBLA 34 (1976). Furthermore, any new examination would have to show the existence of a discovery prior to the withdrawal in 1972. Evidence of a subsequent discovery cannot support appellant's claim. United States v. Garner, 30 IBLA 42, 66 (1977).

Appellant has been afforded notice and an opportunity to be heard. He was present and represented at the hearing and had an opportunity to call his own expert witnesses. He chose not to do so. There is nothing in the record to suggest a different result would obtain from another hearing. The request to reopen the record because of the denial of the motion to vacate is denied.

[3] In mining claim contests the Government has by practice assumed the burden of establishing a prima facie case of no discovery. The burden then shifts to the contestee, appellant here, to establish by a preponderance of the evidence the existence of a discovery during the crucial times shown by the Government's prima facie case, as here, when the land was withdrawn and that the discovery still exists. United States v. Garner, supra. The risk of nonpersuasion is on the contestee. United States v. Johnson, supra. The Government has established its prima facie case. Appellant has failed to meet his burden of persuasion. See United States v. Nicholson, 31 IBLA 224 (1977); United States v. McClurg, 31 IBLA 8 (1977); United States v. Taylor, 25 IBLA 21 (1976). The decision below declaring the mining and millsite claims null and void is supported by the record and will be upheld.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Harvey C. Sweitzer declaring the above-listed claims null and void is affirmed.

_____
Joan B. Thompson
Administrative Judge

We concur:

_____
Edward W. Stuebing
Administrative Judge

_____
Frederick Fishman
Administrative Judge